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SUPREME COURT, U.S.

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 226.

J. LAURITZEN,

Petitioner,

—against—

EVALD JOHANN LARSEN,

Plaintiff-Respondent.

BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CASES CITED:

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OTHER AUTHORITIES CITED:

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Statement.

The Government of the Kingdom of the Netherlands submits this brief in support of the petition for a writ of certiorari because of its interest in having an important question of federal law settled by this Court.

The question involved is, whether Section 33 of the Act of June 5, 1920, 41 Stat. 1007, Title 46 U. S. Code, §688, known as the Jones Act, applies to personal injuries suffered by an alien seaman on a foreign vessel, outside the territorial limits of the United States, simply because the seaman "signed on" in a United States port.

The petition, in substance, is a request to this Court to review the decisions of the United States Court of Appeals for the Second Circuit in the *Kyriakos* and *Taylor* cases.

These decisions, in our submission, constitute a substantial interference in the "internal economy", not only of foreign vessels, but of foreign nations. We need not emphasize that the matter is one of great importance to all maritime nations whose ships call at U. S. ports.

The ruling of the Court below concededly is a further extension of the field of application of the Jones Act, to cases where the sole point of contact with the United States is the place of "sign-on"—which ruling constitutes a total departure from the fundamental principle, that the *lex loci actus* (including the law of the ship's flag) governs alleged wrongs—a principle that was emphatically reaffirmed by this Court in *Uravic* v. *Jarka*, 282 U. S. 234, a case involving the application of the Jones Act to stevedores unloading foreign vessels in United States ports.

The Court of Appeals' decisions cited above appear to us to require urgently review by this Court on the grounds (to be amplified hereunder) that the reasons given for the Court's conclusion are unconvincing; that the views of at least a majority of the five Judges participating in these decisions are irreconcilable *inter se*; and that even the prevailing views were conceded to be "doubtful".

POINT I.

The reasons given for the decisions in the *Kyriakos* and *Taylor* cases, respectively, are in large measure mutually destructive.

Kyriakos v. *Goulandris*, 151 F. 2d 132, was decided by the Circuit Court of Appeals for the Second Circuit in 1945 (Judges A. N. Hand and Frank, Judge L. Hand dissenting). *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597, was decided by the United States Court of Appeals for the Second Circuit in 1950 (Chief Judge L. Hand and Circuit Judges Swan and Clark).

The *Kyriakos* case was the first occasion when a federal appellate court was called upon to determine whether an alien seaman who signed on a foreign vessel at an American port has the right to sue under the Jones Act. In the *Taylor* case, Chief Judge L. Hand, delivering the opinion of the Court, after citing (on behalf of a majority of the Court) various reasons why the Court should *not* follow the *Kyriakos* case; "were we free", nevertheless adhered to the "rationale" of the *Kyriakos* decision (p. 600), the Court being divided two to one as to the "reasons" for their unanimous conclusion.

A comparison between the reasons which led the majority in both cases to their conclusion (both times with expressed grave misgivings) will show the inner inconsistency of the reasoning of that Court:

Kyriakos Case	Taylor Case
A. "* * * the right of suit given by the Jones Act * * * was literally in perfectly general terms, and accordingly did not require express extension. When Congress used the word 'seaman' in the Jones Act it employed a word of general application, embracing men of any nation who sail the seas" (p. 136).	A. "The variant at bar is that the seaman signed articles in the United States. So far as such a claim sounds in tort, the law of the flag should still apply, which will not include the Jones Act" (p. 599). "To Judge Swan and me it seems * * * that, before we impute to Congress the will to change the long settled international understanding that the law of the flag controls in such matters, we should find a more definite expression of that purpose" (p. 600).
B. "The intention of Congress to benefit American seamen would not be served by a contrary construction of the statute, since it would tend to encourage the hiring of foreign seamen in American ports in preference to American seamen because the aliens would not have the right of suit against their employers if injury should occur in those ports, while the American seamen would" (p. 137).	B. "We of course recognize that it is only a question of interpreting the statute, not of power; but the possible consequences of the innovation seem to us to forbid its ready assumption under the facile phrase of the 'policy of the Act'. Nor does the possible disadvantage, at which our view might put American seamen, seem to us considerable enough to imply such a purpose * * *" (p. 600).

Kyriakos Case	Taylor Case
"* * * the sweeping terms of the statute * * * indicate a tendency to give the statutes in aid of seamen a liberal interpretation which would seem to cover the rights of the libellant in the present case. It would not invade the internal economy of foreign vessels further than has already been done and would pro tanto lessen a competitive advantage to foreign shipowners in hiring aliens rather than Americans for their crews" (p. 138).	

The majority of the Court in both cases were in agreement that—

> "liability for a tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, if it affects only the internal economy or discipline of the vessel, by the law of the state whose flag the vessel flies." (151 F. 2d, at p. 138—citing the Restatement of Conflict of Laws, § 405.)

The Court in both cases might well have paid greater attention to Sections 404 and 406 of the same Restatement.

POINT II.

The language of the Jones Act clearly shows an intention not to prejudge the extent of its application to foreign ships and foreign seamen.

While the Act reads, "*Any* seaman who shall suffer personal injury in the course of his employment," it seems obvious that Congress cannot have intended to embrace "men of any nation who sail the seas". To speak of "language * * * literally, in perfectly general terms", which "accordingly did not require express extension" to *foreign* seamen (*Kyriakos* case, at p. 136), seems to involve a *petitio principii*. On the contrary, the language of the Act strongly suggests a purpose to embrace only those cases where the "*common law*" would have given a "right or remedy" had it extended to seamen—that is to say, in those situations where, according to accepted principles of the conflict of laws, the common law would control.

We submit that there is much to be said for the view that Congress deliberately left open all questions pertaining to the conflict of laws, to be decided by our Courts in accordance with established principles.

POINT III.

The reasons advanced by the Court of Appeals in the *Taylor* case to justify the proposed departure from "the long settled international understanding that the law of the flag controls in such matters", are of doubtful validity.

The Court's majority in the *Taylor* case sought to justify exclusion of the law of the flag in these words:

> "So far as (the claim) sounds in contract, it is first necessary to decide whether the question is one of interpreting the extent of the owner's engagements or of their performance; and although that often involves considerable casuistry it appears very clear that here the only question is how comprehensively the owner's promise to employ the seaman shall be construed. Is there to be an implied term that, if injured, the seaman may invoke the Jones Act? Obviously, as a matter of any actual intent that would not be true; yet, when one considers that the employment imposes upon the owner exactly the same obligations as though he had accepted them, it becomes manifest that the extent of his assumed duties is at stake; and if that is not, strictí juris, a question of interpretation, there is no rational reason in solving it to resort to another law."

We raise the following questions, without attempting to answer them:

How is the prevalence of the law of the place where the contract is made over the law of the flag to be

reconciled with the following passage occurring in the paragraph immediately preceding:

> "When a seaman signs articles in a foreign port for service on an American ship, and is injured on the high seas, there is no embarrassment, whether one regards the claim as sounding in tort, or in contract. So far as it sounds in tort, it depends upon American law—the law of the flag—; so far as it sounds in contract, although the law of the place where the contract is made will ordinarily apply, it is a well-recognized exception that in all that concerns the 'internal economy' of the ship the law of the flag controls."?

Is the phrase "internal economy" to mean one thing in the case of American vessels, and another in the case of foreign vessels?

What justification is there for treating a claim for personal injuries under the Jones Act as one "sounding in contract"?

How much "casuistry" should our courts indulge in for the sake of affording an alien seaman signing on a foreign vessel an *election* between the right either to receive *compensation irrespective* of the shipowner's negligence, or to recover *damages* for *wrongful* injury?

Even if, by means of theoretical subtleties, a claim "sounding in contract" can (in a particular case) be spelled out, can there be any doubt that the *dominant* element is the *tort*—thus again establishing the "paramount" position of the law of the flag?

Why should a claim be treated as "sounding in contract" where the liability sought to be enforced exists (if at all) entirely independent of the parties' agreement?

Is it right that a matter of such importance to the international shipping community be made to depend upon considerations so unsubstantial?

CONCLUSION.

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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